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No. 1138

IN THE

Supreme Court of the United States

October Term, [redacted] 1925

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GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

VS.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA WITH ACCOMPANYING BRIEF AND NOTICE OF THE DATE OF SUBMISSION OF SAME

I. PARKER VEAZEY, Jr.,
Great Falls, Montana,
Attorney for Petitioner.

F. G. DORETY,
St. Paul, Minnesota,
Of Counsel.

Filed.....

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GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

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GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

NOTICE OF THE DATE OF SUBMISSION OF PETITION FOR WRIT OF CERTIORARI.

To the Respondents in the above entitled cause; and
To E. E. Enterline, Esq., Casper, Wyoming, and
To J. S. Snellbacker, Esq., Billings, Montana, as Attorneys for said Respondents:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE: That, upon the annexed petition of Great Northern Railway Company, and a certified copy of the entire transcript of the record of the case in said petition referred to, including the proceedings in the Supreme Court of Montana therein referred to, submitted with said Petition, and the petitioner's brief in support of said petition, an application will be made to the Supreme Court of the United States, at a term of said Court to be held at Washington, D. C., on ...Monday..., the...6th...day of...October..., 1924, at the opening of the Court on that day, or as soon thereafter as Counsel can be heard, for a Writ of Certiorari to be directed to the Supreme Court of Montana, and to the District Court for Yellowstone County, Montana, as in the annexed petition prayed.

F. G. DORETY,
I. PARKER VEAZEY, Jr.,
Attorneys for Petitioner.

43930

IN THE

Supreme Court of the United States

October Term, 1923

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

VS.

GALBREATH CATTLE COMPANY, and ANNICE W. PHELPS and FRANCES P. BELDEN, as Executrices and EUGENE PHELPS as Executor of the Last Will and Testament of L. G. PHELPS, deceased, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA, AND TO THE DISTRICT COURT FOR YELLOWSTONE COUNTY, MONTANA.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

GREAT NORTHERN RAILWAY COMPANY, the petitioner above named, in support of this your petitioner's petition for a Writ of Certiorari to review a certain judgment rendered by the Supreme Court of the State of Montana, and a judgment rendered by the District Court for Yellowstone County, Montana, respectfully represents:

1. That the Supreme Court of Montana, in a cause in said Court numbered 5001, and entitled L. G. PHELPS and GALBREATH CATTLE COMPANY, respondents, vs. G. N. RY. CO., appellant, reviewed a

judgment of the District Court for Yellowstone County, Montana, rendered on the 17th day of December, 1920, awarding to the respondents, as plaintiffs in said trial Court, $20,685.90 as compensation for damages claimed to have been sustained to their cattle in an interstate transit from Cody, Wyoming, to Seville, Montana, and the said Supreme Court did, on the 21st day of February, 1923, determine said appeal and did render and pass its judgment that said cause be remanded to the District Court for Yellowstone County with directions to grant a new trial unless the plaintiff would file in the Court below a modification of said judgment by reducing the same in the sum of $1,020.00, and directing that upon said consent being filed the said judgment should be modified accordingly, and as modified should be affirmed, and defendant denied a new trial. That thereupon your petitioner petitioned the Supreme Court of the United States for a writ of certiorari to review said judgment of the Supreme Court of Montana, and said respondents objected to said petition as premature because said judgment of said Supreme Court was not a final judgment in that, in form, it granted a new trial; but said Supreme Court of the United States granted said petition and said cause was docketed as cause No. 29581, Oct. Term, 1923, No. 312, and the record therein was printed and is on file in said Court. That, however, upon said cause coming on for argument in said Supreme Court of the United States, it was ruled that said writ was issued prematurely and that said judgment was not a final judgment, and accordingly said decision of said Supreme Court of Montana could not be reviewed

until further proceedings were had in said cause, and said proceeding was, therefore, dismissed.

2. That thereafter, upon the receipt of the Mandate from the Supreme Court of the United States, the Supreme Court of the State of Montana delivered to the plaintiffs its remittitur to said District Court for Yellowstone County, commanding said Court to grant a new trial as aforesaid unless the plaintiffs would file said consent to said modification, and thereupon, and on the 15th day of May, 1924, the plaintiffs filed said remittitur in said District Court, and at the same time filed their consent to said modification, and *thereupon, on May 15, 1924, the said District Court* for the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, *rendered* and entered *its judgment* in favor of the plaintiffs and against the defendant as conditionally directed by said Supreme Court of Montana. That thereupon, the defendant appealed to the Supreme Court of Montana from said judgment, at the same time filing in said Supreme Court a petition for the advancement of said cause, which was granted, and thereupon, and on June 10, 1924, said cause was submitted (entitled L. G. Phelps (Annice W. Phelps and Frances P. Belden as Executrices and Eugene Phelps as Executor of the Last Will and Testament of L. G. Phelps, deceased, being substituted in lieu of L. G. Phelps, deceased) and Galbreath Cattle Company, respondents, vs. G. N. Ry Co., appellant, No. 5542) to said Supreme Court of Montana upon the briefs filed in said cause No. 312, Oct. Term, 1923, in the Supreme Court of the United States, and upon oral argument by counsel, and *thereafter,* and

on the 21st day of June, 1924, said Supreme Court of Montana rendered its judgment dismissing said appeal for want of jurisdiction for that no appeal would lie from said judgment so entered pursuant to its directions, thereby under the Statutes of Montana (Sec. 9748 Revised Codes of 1921) in effect *affirming said judgment.*

3. That in order *to avoid any question of practice, this petition asks for a Writ of Certiorari to said District Court* for the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, *to review its said judgment rendered on May 15, 1924, and directed also to said Supreme Court of the State of Montana to review its judgment rendered on the said 21st day of June, 1924,* though it would seem sufficient for the Writ to run to the Supreme Court alone, and the petition is filed within three months after the date of the trial Court's judgment.

4. That said judgment, so rendered and passed by the Supreme Court of said State of Montana, was a final judgment in said suit in the highest Court of the State of Montana in which a decision in said suit could be had, or, if not a judgment, then said judgment of said District Court for Yellowstone County was a final judgment in said suit in the highest Court in the State of Montana, in which a decision could be had; and, in said cause, certain rights, privileges, and immunities were claimed by your petitioner under the constitution and statutes of the United States, and the decision in said cause was, in one instance, against one of said rights, privileges, and immunities, and, in another instance, in form in favor of, but in effect

against, another of said rights, privileges, and immunities so especially set up and claimed by your petitioner under the constitution and statutes of the United States, as hereinafter set forth.

A.

THE COURT HAS ALREADY HELD THAT A WRIT OF CERTIORARI SHOULD BE GRANTED HEREIN.

Attention should be called in this petition to the fact that *the Court has already held that petitioner is entitled to a Writ of Certiorari herein* (G. N. Ry. Co., petitioner, vs. Galbreath Cattle Co., 262 U. S. 740; 66 L. Ed. 1209; 43 S. C. 702). Upon the hearing, however, this Court held the petition premature (G. N. Ry. Co., petitioner, vs. Galbreath Cattle Co., ... U. S. .....; 68 L. Ed. 387; 44 S. C. 344.) *The record of this case has been printed in cause No. 312, Oct. Term, 1923, and the later proceedings have now been had in conformity to the ruling of the Supreme Court of the United States* as to what should be done before the judgment would become final *so that said cause could be reviewed by that Court.*

With this object in view the Supreme Court of Montana, on petition of petitioner, concurred in by respondents, *cut short all rules of procedure, advanced the cause* for hearing, *and adopted as its transcript* on the second appeal *a copy of the record printed by the Clerk of the Supreme Court of the United States* in said cause No. 312, Oct. Term, 1923, supplemented by the later proceedings in the trial Court; *and* the parties and the Montana Supreme Court adopted *the briefs filed* in said cause *in said Supreme Court of the United*

States to the end that the party against whom the decision might be rendered could obtain a review at as little expense as possible, and said Supreme Court of Montana, after argument, having declined to modify or re-examine its former ruling, *said cause has now been shaped for review by the Supreme Court of the United States* in accordance with its decision in said former proceeding in certiorari requiring further proceedings in the State Court.

The entire record has been printed by the Clerk of the Supreme Court of the United States, *the printed briefs* in said cause No. 312, *are on file* and, upon the writ being granted, said cause could be advanced for immediate hearing upon the said record and briefs already on file.

B.

DENIAL OF RIGHT OF REMOVAL TO THE UNITED STATES COURT

Your petitioner duly filed in the trial Court a petition for the removal of the case to the United States District Court (Transcript pp. 6 to 8), on the ground that the complaint (Transcript pp. 1 to 5) showed that the case arose under the laws of the United States and, indeed, being a case to recover alleged damage to cattle in an interstate shipment, it arose under the federal laws regulating commerce and, secondly, on the ground that it arose between citizens of different States, in that the defendant was a Minnesota citizen and one of the plaintiffs was a Wyoming citizen, and the other plaintiff was a Montana citizen. THE TRIAL COURT found the right of removal properly preserved but RULED THAT THE CASE DID NOT

ARISE UNDER THE COMMERCE LAWS AND THAT THERE WAS NOT SUFFICIENT DIVERSITY OF CITIZENSHIP, AS A MATTER OF VENUE, FOR THE SUIT TO BE ORIGINALLY BROUGHT IN THE FEDERAL COURT AND, THEREFORE, THE COURT DENIED REMOVAL. (Transcript pp. 8 to 9.) THE SUPREME COURT overruled defendant's exception and sustained the denial of the right of removal, and DECLINED TO FOLLOW THE CONTROLLING DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN *General Investment Company vs. Lake Shore and Mich. S. Ry. Co.*, 43 Sup. Ct. 106, and in *Lee vs. Ches. & O. Ry. Co.*, 43 Sup. Ct. 230, AND HELD THAT THESE DECISIONS were not controlling or applicable and DID NOT AFFECT other decisions such as SMITH VS. LYONS, 133 U. S. 315, and CAMP VS. GRESS, 250 U. S. 308, AND THAT, therefore, THE VENUE PROVISIONS, of the Federal laws, DEFINING ORIGINAL JURISDICTION so-called, STILL CONTROL JURISDICTION ON REMOVAL, contrary to the clear and express declarations of the said recent controlling decisions of this Court. Said Supreme Court also ruled that this cause did not arise under the commerce laws of the United States, thereby declining to follow the decisions of this Court in C. & N. W. Ry. Co. v. Whitnock, 42 Sup. Ct. 328; M. K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617 at 619, 244 U. S. 383, and in the case of the So. Pac. Co. vs. Shewart, 245 U. S. 359, 38 Sup. Ct. 130; 245 U. S. 562; 38 Sup. Ct. 301; Penn. Ry. Co. vs. Olivit Bros., 243 U. S. 574; 37 Sup. Ct. 468; Kans.

City So. Ry. Co. vs. Carl, 227 U. S. 639; 33 Sup. Ct. 391. A DENIAL OF A WRIT OF CERTIORARI IN THIS INSTANCE WOULD THUS THROW THE ENTIRE LAW OF REMOVAL INTO CONFUSION AND THE GRANTING OF THE WRIT IS NECESSARY TO SECURE FOR DEFENDANT THIS FEDERAL RIGHT OF REMOVAL WHICH HAS BEEN DENIED TO IT IN THE VERY FACE OF THESE CONTROLLING DECISIONS.

A writ of certiorari has just been acted upon in another case (Central Co. vs. Ocepek, 43 Sup. Ct. 361), to give the relief here asked.

B.

DENIAL OF OTHER FEDERAL RIGHTS, ETC.

It is somewhat unsatisfactory to present as a ground of reversal a single procedural question of jurisdiction alone, and hence your petitioner asserts ADDITIONAL GROUNDS FOR ASKING THE WRIT herein prayed showing how in other respects your petitioner has been unjustly deprived of further Federal rights.

Thus, in the first place, (a) there was

A Denial of Duty on the Shipper to unload, feed, water and rest cattle in an interstate shipment and placing this duty on the carrier, contrary to the Federal Statute.

THE TRIAL COURT, in its instructions to the jury, REFUSED INSTRUCTIONS No. 27 and 27-A (Tr. pg. 258) requested by defendant, GIVING EFFECT TO THE STATUTES OF THE UNITED STATES (Sec. 8651 Comp. Sts. of 1918) AND the provisions of THE INTERSTATE BILL OF LADING governing this interstate shipment, whereby the

duties connected with the unloading and caring for the animals in transit would normally rest on the shipper and instructed the jury (Tr. pp. 246 to 248) that this duty, under the circumstances named, rested on the carrier.

The Instructions refused read as follows:

No. 27:

"You are instructed that under the law the obligation to unload and reload the cattle in transportation rested upon the shippers and not upon the railway company and that therefore the railroad company is not under any obligation to furnish for the purpose of unloading or reloading the cattle in question expert help in that regard, and that plaintiffs cannot complain in this action because the men who assisted in the unloading and reloading were not expert cattle men." (Tr. p. 258.)

No. 27 A:

"You are instructed that aside from doing the actual details of the unloading, loading or care of the cattle in transit the duty of supervising said unloading, loading and care rested primarily upon the plaintiffs and their agents, and they cannot recover for damages, if any, caused by negligence, if any, on their part in not properly supervising said unloading, loading or care (aside from doing the actual details of the same) or to which their said negligence, if any, contributed as a cause." (Tr. p. 258.)

THE SUPREME COURT OF MONTANA, in its decision (p. 272 to 275) HOLDS THAT IT WAS ERROR TO REFUSE THESE REQUESTED INSTRUCTIONS concerning a vital matter in the cause reasonably exerting a controlling influence on the jury (See testimony: Original Exhibit 1; Tr. p. 73, l. 18, to p. 74, l. 5; p. 552, ll. 5 to 18; p. 57, l. 21, to p. 58, l. 19; p. 59, ll. 13 to 24; p. 60, ll. 10 to 20; p. 83, ll. 5 to 9; p. 86, l. 23, to p. 87, l. 8; p. 87, ll. 21 to 26; p. 88, l. 29,

to p. 89, l. 23; p. 93, ll. 16 to 20; p. 261, l. 10, to p. 265, l. 4; p. 261 to 264), AND THEREBY RULED IN FAVOR OF THE FEDERAL RIGHT CLAIMED BY YOUR PETITIONER AS DEFENDANT BUT THE SUPREME COURT, after ruling that the trial Court denied defendant a Federal right and after upholding the Federal right, DECLINED TO GIVE EFFECT TO THIS FEDERAL RIGHT FOR, instead of reversing the judgment so grounded upon this denial of a federal right, THE COURT UPHOLDS THE JUDGMENT SO ERRONEOUSLY GROUNDED NOTWITHSTANDING THIS ERROR. The Supreme Court, in effect, thus denies the Federal right.

(b)

Imposing Burden of Proof on Carrier Where Shipper Accompanies Stock.

The trial Court placed the burden of proof in this action upon the carrier (Instruc. 5; Tr. p. 244 to 245) notwithstanding this was an interstate shipment and the shipper's caretaker accompanied the shipment, whereas, under the Federal Law, the burden would be on the shipper. The Supreme Court upheld this action of the trial Court on the ground that the interstate character of this shipment was defeated by this being an action against the terminal carrier, and hence the exceptional Montana rule (Nelson v. G. N. Ry. Co., 28 Mont. 297; 72 Pac. 642) on the burden of proof applied, and thereby the Supreme Court denies your petitioner, as a terminal carrier in an interstate shipment moving under a bill of lading issued by the initial character, a Federal right. Thereby the Court misunder-

stood the effect of the case of M. K. & T. Ry. Co. vs. Ward and other cases infra, and many decisions to the effect that in interstate shipments the burden is on the shipper whose caretaker accompanies the shipment:

Berry v. C. & A. Ry. Co., 208 S. W. 622 at 623;
Baker v. Schaff, 211 S. W. 103 to 104;
Bland v. C. & A. Ry. Co., 232 S. W. 268;
Neely v. Hines, 227 S. W. 650.

and those decisions holding that the matter of the burden of proof is a matter of substance and not of procedure (So. Pac. Ry. Co. vs. Prescott, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. 469) and thus a review of said judgment is necessary in order to clarify the law as to the nature of this kind of case and as to the burden of proof in this kind of suit.

Your petitioner further says that it has no right of appeal or to a writ of error from this Honorable Court, and said errors can be corrected only by the writ herein prayed.

It would seem that it would be sufficient that the Writ of Certiorari be directed to the Supreme Court of Montana alone as that Court alone has the entire record (the record of the District Court and its own record of proceedings subsequent to the appeal), and under the Montana Code (Revised Codes of 1921, "Sec. 9748: The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from") the decision of the Supreme Court of Montana on the second appeal declining to re-examine its former decision on these federal questions, is, as far as further review is concerned, a decision affirming the judgment below and, therefore, it is that judgment which constitutes

the judgment of the highest court of the State.

Your petitioner furnishes and presents herewith as an exhibit marked "Exhibit A" to this petition, a certified copy of the entire record of said case including the proceedings in the Supreme Court of the State of Montana.

WHEREFORE, Your petitioner prays that this Court require that there be certified to it for review and determination the cause aforesaid and that, to this end, a Writ of Certiorari issue out of this Court directed to the Supreme Court of the State of Montana, and to the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, commanding said Courts to certify and send to this Court, on a day therein to be designated, a full and complete transcript of the record of its proceedings and that said judgment of said Supreme Court of Montana, and of said District Court for Yellowstone County may be reversed, and that your petitioner may have such other and further relief or remedy in the premises as to the Court may seem appropriate.

F. G. DORETY,
St. Paul, Minnesota,
and
I. PARKER VEAZEY, JR.,
Great Falls, Montana,
Attorneys for Petitioner.

UNITED STATES OF AMERICA }
STATE OF MONTANA } SS.
COUNTY OF CASCADE }

I. Parker Veazey, Jr., being first duly sworn on oath, deposes and says: That he is one of the Attorneys of record for the Petitioner named in the foregoing petition and its Attorney of record in personal charge in the trial Court and in the Supreme Court of the State of Montana of the proceedings named in said petition and makes this affidavit for and on its behalf (for the reason that said petitioner is a corporation and no officer of said corporation is in the County of Cascade or the State of Montana, and no officer or agent of said corporation knows the truth of the facts therein stated better than affiant.) That the statements made in said petition are true to the best of affiant's information and belief, based as aforesaid from personally conducting said proceedings and from an examination of the records thereof. That this petition is made and presented in good faith and not for delay.

I. PARKER VEAZEY, JR.

Subscribed and sworn to before me this 3 day of January, A. D. 1924.

W. L. CLIFT,

Notary Public in and for the State of Montana, residing at Great Falls, Cascade County, Montana. My Commission expires Nov. 29th, 1924.

IN THE

Supreme Court of the United States

October Term, 1923.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Petitioner,

vs.

GALBREATH CATTLE COMPANY, et. al., Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The argument, especially on the removal feature, will be brief and only sufficient to outline more clearly the errors urged. *This brief is in effect merely a copy of the brief previously filed upon which a Writ of Certiorari was granted. A more detailed, complete, brief is on file in cause No. 312, October Term, 1923,* which would be adopted here except that extra copies may have been destroyed.

A.

DENIAL OF REMOVAL TO FEDERAL COURT.

As to the right of removal was seasonably urged, all further proceedings were without jurisdiction and void:

B. & O. R. Co. vs. Koontz, 104 U. S. 5; 26 L. Ed. 643;

Gordon vs. Longest, 10 L. Ed. 900; 4k U. S. 97;

Goldey vs. Morning News, 156 U. S. 518; 16 Sup. Ct. 509; 39 L. Ed. 517;

Kanouse vs. Martin, 14 L. Ed. 660; 56 U. S. 198;

National Steamship Co. vs. Tugman, 106 U. S. 118; 1 Sup. Ct. 58; 27 L. Ed. 87;

Powers vs. Chesapeake & O. R. Co., 169 U. S. 92; 42 L. Ed. 673; 18 Sup. Ct. 264;
Kern vs. Hindekoper, 103 U. S. 485; 26 L. Ed. 354;
Home Life Insurance Co. vs. Dunn, 22 L. Ed. 68; 86 U. S. 214;
Marshall vs. Holmes, 141 U. S. 589; 12 Sup. Ct. 62; 35 L. Ed. 870.

THOUGH THE ENTIRE RECORD IS VOLUMINOUS, THE PERTINENT PORTIONS ON THE REMOVAL FEATURE ARE INVOLVED IN A FEW PAGES. This would include the complaint (pp. 1 to 5) and the removal proceedings (pp. 5 to 9).

First, as regards the case as arising under the Commerce Laws:

The Complaint showed an attempt to collect some $45,000 damages sustained to cattle in transit from Cody, Wyoming, on the Burlington Railroad, through the junction with the railroad of the Great Northern, your Petitioner, at Mossmain, Montana, to Seville, Montana, the action being brought against the terminal carrier over whose line it is alleged the damage occurred. The Plaintiffs claim that the interstate nature of the shipment or that any reliance on the Federal law did not appear in the complaint comes with poor grace, as the complaint alleged that the Burlington issued a through bill of lading on which the shipment was moved (page 2), and a new live stock contract issued by the Great Northern at Mossmain was excluded, when offered in evidence, on the ground that the original contract completely controlled the entire movement (pp. 31 to 34) and the complaint charged confinement in cars, and a 36 hour lease governed the movement (p. 34), and the plaintiffs also obtained a

ruling that the interstate character of the shipment made void the limitation of value provided in the contract (p. 248).

As the shipment originated in Wyoming and was destined to Montana, though the terminal carrier movement was wholly in Montana, the liability was controlled by the Federal law, which made the original contract controlling to destination, and imposed the duties and liabilities of the 28 hour law regarding unloading and resting, and made void the limitation as to value. The following authorities show that such a suit arises under the laws of the United States:

Adams Express Company vs. Croninger, 226 U. S. 491; 57 L. Ed. 314; 33 Sup. Ct. 148;
Kas. City So. Ry. Co. vs. Carl, 33 Sup. Ct. 391; 227 U. S. 639; 57 L. Ed. 683;
G. F. & A. R. Co. vs. Blish Milling Co., 241 U. S. 190; 60 L. Ed. 948; 36 Sup. Ct. 541;
C. & N. W. Ry. Co. vs. Whitnack Co., 42 Sup. Ct. 328; 258 U. S. 369; 66 L. Ed. 665;
O. W. R. & N. Co., vs. McGinn, 42 Sup. Ct. 332; 258 U. S. 409; 66 L. Ed. 689;
M. K. & T. Ry. Co. vs. Ward, 37 Sup. Ct. 617; 244 U. S. 383; 61 L. Ed. 1213;
Penn. Ry. Co. vs. Olivit, 37 Sup. Ct. 468; 243 U. S. 574; 61 L. Ed. 908;
C. & W. C. R. Co. vs. Varnville Furn. Co., 237 U. S. 577; 59 L. Ed. 1137; 35 Sup. Ct. 715.

In opposition the Supreme Court of Montana cited, in its opinion, only two nisi prius decisions.

As the case arose under the Federal law, and, indeed, under the Commerce Laws, jurisdiction was conferred, as asserted in Petition for Removal, by the 8th subdivision of Section 991 of the Compiled Statutes, and removal was proper to the Federal Court of Montana

irrespective of the venue provisions regarding suits originally brought in the Federal Court. The case of

General Investment Co. vs. Lake Shore & M. S. Ry. Co., 43 Sup. Ct. 106

is controlling.

But the Supreme Court ignored this decision, in its original opinion, on the ground that that case arose under the Federal Law, but that the present case did not, and the Court declined to heed the language of the General Investment case which was applicable to all removal cases.

However, diversity of citizenship was also urged as a ground of removal and hence, after the argument, to escape this threatened distinction being urged further, the case of

Lee vs. Ches. & O. Ry. Company, 43 Sup. Ct. 230,

was cited to the Court but this case too was not heeded and, when pressed upon the Court in the Petition for Rehearing, the Court amended its Opinion by adding a paragraph that these two cases did not overrule

Smith vs. Lyons, 133 U. S. 315, and
Camp vs. Gress, 250 U. S. 308.

The cases of Smith vs. Lyons and Camp vs. Gress are, however, cases originally brought in a Federal Court, and it is held that the venue provisions in regard to suits originally brought require that jurisdiction shall be denied if any plaintiff or defendant is not a resident of the district where the suit is brought. The old provision of the law was that, as regards diverse citizenship, the suit must be between a citizen of the State where suit is brought and a citizen of another

State, but Camp vs. Gress expressly says that the Act of 1887-8 (and the Judicial Code) "did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff." In those two cases it is clear that the Court is considering, not jurisdiction of the subject matter, but venue rights of the parties, which they may waive, and the question as to whether there was a waiver was argued.

Of course, as stated by the Supreme Court of Montana, the General Investment case and the Lee case do not affect the cases of Smith vs. Lyons or Camp vs. Gress, for the two latter cases concern only venue in cases originally brought in Federal Courst, while the two former concern only venue in cases to be removed from State Courts, and, under these two recent decisions, it is held that venue as to the original proceedings has nothing to do with venue or removal. Moreover THE SUPREME COURT OF THE STATE, in ruling that the two former cases are not controlling, HAS NOT HEEDED THE EXPRESS STATEMENT IN THE GENERAL INVESTMENT CASE (43 Sup. Ct. 106 at 112, 1st paragraph) THAT THE DECISION IN CAMP VS. GRESS WAS BASED ON THIS VERY DISTINCTION.

The cases of Tenn vs. Bank, 152 U. S. 454; 14 Sup. Ct. 654; Mexican National Bank vs. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, and Cochran vs. Montgomery Co., 199 U. S. 260, 26 Sup. Ct. 58, cited by the Supreme Court of the State, to the effect that a case to be removable must be one which could have originally been brought in a Federal Court are not in point, as

these cases all relate to jurisdiction of the subject matter, and not to venue, and THE SUPREME COURT OF THE STATE, IN CITING THESE DECISIONS, HAS NOT HEEDED THE EXPRESS STATEMENT OF THIS COURT IN THE GENERAL INVESTMENT COMPANY CASE (43 Sup. Ct. 106 at 114, 1st paragraph) TO THE EFFECT THAT THESE CASES ARE NOT IN POINT.

As the defendant here was a Minnesota citizen, and the plaintiffs were citizens of States other than Minnesota (Wyoming and Montana), there was jurisdiction of the subject matter of this suit as a controversy between citizens of different States, and this suit could have originally been brought in any Federal Court, subject to a personal privilege in a defendant to object to the venue, but this would relate to venue and have nothing to do with removal, the venue of which, on removal, would be the Federal Court of the State where the suit was brought.

How, or why, the Lee and General Investment cases are not in point, or how, or why, the cases cited by the Court at plaintiff's instance, are in point does not appear.

B.

DUTY TO CARE FOR ANIMALS IN TRANSIT

The trial Court refused requested instructions No. 27 and 27 A imposing the general duty of caring for the animals in transit, on the caretaker as required by the contract and sustained the plaintiff's objection that "there was a default on the part of the shipper, and that the Act of Congress required the carrier to properly unload and feed the animals in the event that the

shipper did not, and on the ground that the defendant was assisting in unloading." (M. 2581, l. 6, to p. 583, l. 4.) The Supreme Court concerning this said:

"The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court actually instructed the jury as follows:

Requested Instruction No. 8:

"You are instructed that if you find from the evidence in this case that the defendant in this case undertook and did unload the cattle at Great Falls, Montana, for the purpose of feeding, watering and caring for the same, and that plaintiffs compensated the defendant for the feeding thereof, then it was the duty of the defendant to unload the cattle in a humane manner into pens properly equipped for rest, water and feeding and while the cattle were so unloaded it was the duty of the defendant to properly feed and water the same during the time the cattle were at Great Falls, Montana." (Tr. p. 559, l. 5; p. 563, l. 23; p. 584 to 586.)

The Supreme Court says that "the giving of this instruction was error," because not warranted by the evidence and, in any event, in other respects, it was error to give it.

Then the Court, in its decision declining to reverse the judgment, brushes these errors aside practically without comment and thereby deprives the defendant of the right which it had to have the jury correctly instructed, as regards the duty of caring for the animals in transit. It is idle for the Court correctly to interpret the Federal Law in favor of the defendant if, when the jury is erroneously instructed on that law and

the defendant therefore prejudiced, no relief is to be given.

The Supreme Court says that, if the matter of unloading and feeding in transit is eliminated from the case, the other errors may be disregarded and the case of liability for the 142 head that died was fully tried under fairly proper instructions. In this respect the Court overlooks that the unloading, feeding and watering at Great Falls was strongly stressed in the evidence as a cause of the death of 142 head and by plaintiffs as a cause of some $30,000 depreciation in the balance of the herd.

BY WHAT RIGHT DOES THE COURT ELIMINATE THE MATTER OF THE UNLOADING AND FEEDING AT GREAT FALLS AND THE CLAIMED DEPRECIATION IN THE BALANCE? THE COURT DOES NOT AND COULD NOT SAY THAT THESE THINGS AND THE ADMITTED ERRORS IN THE INSTRUCTIONS ON THIS DID NOT AFFECT THE JURY.

To show how unwarranted was this action of the State Court it is necessary for us to briefly condense the testimony. *We cite plaintiff's testimony but here it should be borne in mind that defendant's testimony may also be considered because a conflict requires reversal if the jury was not properly instructed on that conflict.*

THE MAIN DAMAGE WAS DUE TO IMPROPER CARE IN TRANSIT

The shipment consisted of 984 head, of which 519 were three-year-old cattle, and the balance yearling steers (fol. 128; fol. 134; fol. 156; fol. 164). IT WAS

UNDISPUTED THAT WHEN THE ANIMALS WERE UNLOADED AT GREAT FALLS IN TRANSIT THERE WERE ONLY 9 DEAD AND 86 DOWN, AND THESE WERE LIMITED TO 3-YEAR-OLD CATTLE. Defendant's Exhibit 14 (fol. 359), a list made out as each car was unloaded, showed that, of eleven cars loaded with only yearling cattle, there were no cattle down and none dead. The remaining 21 cars were loaded with 3-year-old cattle, with the exception that seven of these cars each had one yearling with the older cattle (fol. 355 to fol. 360).

The President of the Cattle Company (p. 64, fol. 149 to 151) testified that later, after unloading, in addition to the 9 dead at the time of unloading, 132 more died. It was extraordinary, therefore, that the astonishingly heavy loss should occur in such a short transit, and there must have been some peculiar reason for all of the 142 dead cattle being 3-year-old cattle except two.

The plaintiffs claimed that the damage was due to the animals becoming overheated by a delay at the time the cattle were received by the Great Northern at the Junction at Mossmain, from eleven o'clock at night to five o'clock in the morning, awaiting connection and by one hour's delay in transit at Armington near Great Falls, awaiting opposing trains. Defendant claimed the loss was mainly due to a failure to give the animals proper care at Great Falls.

(2.)

Defendant Gave Many Reasons Why This Was True, Due to a Failure to Discharge the Duty of Caring for the Cattle at Great Falls.

The defendant showed that the animals had been practically off water, as far as any conscious effort to water them was concerned, for about 24 hours before loading at Cody was completed and, therefore, for more than 48 hours before unloading. This was undisputed (p. 26 to 28; p. 39; p. 40 to 41; p. 43 to 46; p. 125 to 127; p. 119 to 130; p. 39 to 48; p. 128 to 129), except plaintiffs denied that the animals would be thirsty. After watering at Cody only the day before loading the 3-year-olds were grazed on "salt sage" (p. 27; p. 121; p. 124; p. 126 to 127), it being admitted

that this sage would increase the need for water (p. 121; p. 100 to 101; p. 196 to 197), though it was disputed whether it would be inherently injurious. Moreover the animals were not loaded in the cool of the early morning. The older cattle were separated from the younger cattle, preliminary to loading, in the heat of the day with the thermometer at 90 degrees, and they were also loaded first and remained packed in the cars for about 4 hours in the hot dusty atmosphere of the loading corrals (p. 28; p. 45 to p. 46; p. 48; p. 121 to p. 122; p. 127 to p. 128; p. 47). The three-year-old animals were also heavier loaded being loaded to a minimum of 26,000 pounds to the car, and the yearlings to a maximum of 16,000 lbs. (p. 46; p. 157; p. 91; p. 122; p. 119; p. 220 to p. 221; p. 222; p. 224 to p. 225; p. 226 to p. 229).

(3.)

ACTS OF THE CARETAKER AT GREAT FALLS AS A CAUSE OF THE DAMAGE.

The defendant contended that vastly the greatest part of the damage was due to the failure of the caretaker in handling the animals at Great Falls, overheated as they then were partly by reason of the foregoing conditions. The three-year-old animals required special care as to water. On arriving at Great Falls, the shipper unloaded the animals because of their condition, assisted by section laborers. But at that time, the gravest results had not been exhibited. There were but nine dead and the later deaths were largely due to him.

Thus the caretaker testified for the plaintiffs, that the railroad company sent a veterinary to assist him in handling the situation the next day after the unloading had been completed, in caring for the animals and while they were resting there (p. 37). This veterinary cautioned him, the caretaker distinctly recalled, to go easy in watering the animals and not to give them too much to drink, but the damage had already been done, for the caretaker testified that, upon arrival, when the animals would be unloaded, each car would be unloaded into a pen with water and the animals were very thirsty

and would "make" for the water with a rush (p. 37; p. 113 to 114). The caretaker recognized that the trainmen and sectionmen were merely assisting him and were not expert cattle men, but were there only to carry out his instructions (Tr. p. 25; p. 37; p. 38; p. 83; p. 40), yet he gave them no instructions, where instructions were necessary, and exercised no care in cautioning them, except in minor particulars and his supervision was admittedly neglectful. In the matter of watering the animals, on which he was later cautioned by the veterinary, he exercised no prohibiting supervision, but acquiesced in, and took part in, what was done and, though he interfered with the men and exercised an active supervision in unloading, he allowed each car to be unloaded into the pens, in the ordinary way, with water and gave the animals all the water they could get (Tr. p. 38; p. 24; p. 25; p. 35; p. 38; p. 40; p. 113 to 114).

Indeed, at that time, far from keeping the animals off from large quantities of water, and instead of giving it to them slowly, he complained that the troughs were leaking so that the animals did not have an opportunity at once to take on a big fill from a full trough. The cattle were so thirsty that on hearing the water running in the troughs they would rush for it, piling over each other, to drink. (Tr. p. 24; p. 113 to p. 114).

The action of the caretaker was condemned by all. He was an inexperienced college student at the time, never having had any previous experience in handling cattle. He protested at the time of loading against being sent out with such a responsibility. (Tr. p. 28 to 29; p. 26; p. 22).

The witness Carney testified for the plaintiffs that he saw the cattle being unloaded into the pens with water, and the stronger were crowding the weaker ones and trampling them down. He saw a young fellow around there representing the shipper and Carney added, "It is true that I did feel that if he were supervising the attention that should be given to the cattle while unloading, or whoever was supervising, was not supervising correctly." The testimony of this witness was

practically limited to his account of what he considered a rather shameful neglect on the part of whoever was charged with the duty of supervising and is found on pages 113 to 114 of the transcript.

The plaintiffs contended that, as bills were tendered by the defendant to the plaintiffs for feed furnished to the animals (Tr. p. 69 to p. 70), any duty in connection with watering and feeding the animals rested upon the defendant (Tr. p. 258). But these bills were merely for the price of the feed, not for labor.

The following references to the transcript, showing the presence of the caretaker and his neglect, set forth only the plaintiff's testimony and not the defendant's testimony in part in accord with, and part in opposition thereto (Tr. p. 24 to p. 25): "We finished unloading the 19th" (Tr. p. 25; p. 35 to p. 38). "A veterinarian that the railroad company had sent to me to assist me in handling the situation" (p. 37). "In the process of unloading I had only the assistance of the trainmen and section crew" (Tr. p. 38). "The crew that was working there and assisting was in charge of a foreman for the company. They were in charge of the section foreman" (p. 40; p. 113 to 117; p. 35).

Defendant's testimony was to the same effect (Tr. p. 344 to p. 365).

The defendant's requested instructions merely gave effect to the Federal Statute.

Comp. St. 1918, Sec. 8651.

That these requested instructions correctly stated the law is shown by the following decisions:

A. T. & S. F. Ry. Co. vs. Merchants Livestock Co., 273 Fed. 130;

Penn. R. Co. vs. Swift & Company, 258 Fed. 289;

Webster vs. U. Pac. Ry. Co., 200 Fed. 597 at 599;

Starr vs. C. B. & Q. R. Co., 173 N. W. 682;

Fluckinger vs. Chic. & N. W. Ry. Co., 154 N. W. 865;

So. Ry. Co. vs. Tollerson, 68 S. E. 798.

Indeed, the decision of the Supreme Court of Montana may be cited in support of this error, for the Court says:

> "The duties imposed on plaintiffs under this contract were not called to the attention of the jury by any instruction given by the Court, as they should have been. The offered instructions were directed to that specific subject and should have been given. The Court's refusal to give them was error."

The Court's decision thus amounts merely to a statement that though the refusal to give these instructions was error and the error was doubled because of error in the instructions given on the subject, this was apparently harmless error, because, in the Court's opinion, the unloading and care of the animals at Great Falls did not contribute to the damage.

But the Court has no right arbitrarily so to rule, for, up to the time of the close of the plaintiff's case, there was no question, in the actual admissions of the plaintiffs' testimony, that the work of unloading, caring for and reloading the animals at Great Falls, was in charge of the shipper's caretaker, and no dispute existed that all of the duties of care in this particular rested upon the shipper to determine what should be done and to supervise the hands that were admitted to be merely assisting him. But, with this testimony manifesting such neglect in supervision, the plaintiffs appreciated the seriousness of the case if the jury were permitted to consider the palpable cause of the plaintiffs' damage as a neglect of a duty resting upon the shipper and hence it was that, in the settlement of instructions, the plaintiffs changed front and urged literally that the caretaker's failure was so great as to amount to a de-

fault by the shipper and hence, that the duty fell upon the carrier to make good this default, and these objections were sustained.

IT IS CLEAR THAT IT WAS DEFENDANT'S CONTENTION, SUSTAINED BY THE PROOF, THAT a great deal of fatal damage had not occurred when the animals were unloaded at Great Falls, and IT WAS THE CARE OF THE ANIMALS IN GREAT FALLS AND THE SUDDEN ADMISSION OF THE ANIMALS TO WATER THAT CAUSED THE DEATHS AND whatever additional damage was caused. Possibly there may have been a play for judgment either way in this particular, BUT THE CASE WAS SUBMITTED TO THE JURY ON THE BASIS THAT ANY MISTREATMENT AT GREAT FALLS, IN THE MATTER OF UNLOADING AND WATERING AND FEEDING THEM WAS A VIOLATION OF DUTY BY THE DEFENDANT, AND NOT A VIOLATION OF DUTY BY THE SHIPPER. THE JUDGMENT MAY FAIRLY BE CONSIDERED AS GROUNDED ON THE ERRORS IN THESE INSTRUCTIONS. These errors could not possibly be harmless.

We have shown the federal right especially claimed by the petitioner and that the Supreme Court of the State recognized the validity of the claim and then denied it, as a matter of procedure, under a declaration apparently that its denial did not affect the result, though how or why it did not affect the result is not stated.

Under the federal decisions, however, if it is clear that when a federal right is specifically set up and

claimed, the Federal Court will not allow the State Court, under the guise of mere procedure, to deny the federal right.

Atlantic Coast Line R. Co. vs. Burnette, 36 Sup. Ct. R. 75, 239 U. S. 199; 60 L. Ed. 226;

Ward vs. Love County, 253 U. S. 17; 64 L. Ed. 75; 40 Sup. Ct. 419.

This case may be said to be somewhat unique in two respects; here (1) A STATE COURT HAS DENIED A FEDERAL RIGHT BY DECLINING TO HEED TWO CONTROLLING DECISIONS OF THE FEDERAL SUPREME COURT AND (2), IN THE SAME CASE, THE COURT ALSO REFUSES TO GIVE EFFECT TO ANOTHER RIGHT GIVEN BY A FEDERAL STATUTE, THE DENIAL OF WHICH, DECLARING IT TO HAVE BEEN ERROR, IT SEEKS TO EFFECT UNDER THE GUISE OF PROCEDURE.

III.

ERRORS ON BURDEN OF PROOF

In this case we need not really consider upon whom rests the burden of proving negligence. The issue is a simple one as to whether, where the shipper accompanies the stock and is in charge thereof, is the burden of proof on him or on the carrier either as to negligence or to trace *the cause of damage* to some act or omission of the carrier. The animals are admitted to have become sick in transit. They were over-heated and the question is whether the deaths were due to any over-heating due to defendant's negligence, or were the deaths due to sickness caused by over-heating, or to sickness caused by the act of the shipper in handling

them at Great Falls and, especially in admitting the animals too quickly to too much water while overheated. Bear in mind that the animals were in the charge of the shipper all the time and, as far as the claim for depreciation in the living animals is concerned, the animals were, for five days taken away by the shipper from the railroad premises and exclusively in the custody of the shipper.

There is some little diversity of authority in the State decisions as to whether the burden of proof is on the carrier as to peculiar railroad matters, that is to say, to show that it was not negligent (10 Corpus Juris p. 379, Sec. 581). Where the issue is negligence and damage and its cause, following sickness, that is to say, damage and what acts or omissions (negligent or otherwise and by whomsoever done) caused the damage, the rule is stated in 10 Corpus Juris, p. 380, as follows:

> "*Sickness of livestock:* An important limitation on the foregoing principles, recognized by some decisions and perfectly sound in principle, is that where a recovery is sought for the sickness of live stock in transit, or from death resulting from sickness, the burden is on plaintiff to prove the carrier's negligence."

Indeed, though there is some slight conflict in the state decisions, the great weight of authority is to the effect that, where the shipper accompanies a shipment of livestock, the burden of proof is on the shipper all along the line, that is to say, the burden of proof is then on the shipper to show (a) the damage sustained by the stock in transit and (b) what acts or omissions of the defendant caused this damage and (c) that these

acts or omissions of the defendant were negligent. Where, as is claimed here, there might be damage caused by acts of the shipper and by acts of the defendant, it might more correctly be said that the burden of proof was on the shipper to show (a) the entire damage sustained by the animals; (b) what acts or omissions caused the damage; (c) if some of these acts or omissions of the shipper, what part of the damage was caused by acts or omissions of the shipper and what part by acts or omissions of the carrier, and (d) that these acts or omissions of the carrier were negligent.

Thus from

10 Corpus Juris p. 381 and 382

we quote:

"Where Owner Assumes Care of Stock During Transportation aa. Burden of Showing Negligence of Carrier. Although there is some authority to the contrary, the general rule is that, where by special agreement the owner of stock or his agent accompanies the shipment for the purpose of giving care and attention to stock, the burden is on the owner, in an action for damages for loss or injury alleged to be due to the negligence of the carrier, to prove that the loss or injury was the result of the carrier's negligence."

In the note to this text many cases are cited, from which we select the following:

Lane vs. Oregon Short Line R. Co., 198 Pac. 671 (Ida.);

Zimmerman vs. Northern Pacific Ry. Co., 167 N. W. 546 (Minn.);

Starr vs. C. B. & Q. R. Co., 103 Neb. 645; 173 N. W. 682 at 683;

Bartelt vs. Ore. R. & N. Co., 57 Wash. 16; 106 Pac. 487 at 488; 135 Am. S. R. 959;

St. Louis & S. F. R. Co. vs. Wells, 81 Ark. 469, 99 S. W. 534 at 536;
Terre Haute & L. R. Co. vs. Sherwood, 132 Ind. 129; 31 N. E. 781, 32 Am. S. R. 239, 17 L. R. A. 339;
Mosteller vs. Iowa Cent. Ry. Co., 153 Ia. 390, 133 N. W. 748 at 749.

The statements in the leading text books show the rule to be almost universal, and that the Montana decision in the Nelson case is almost without a companion.

5 Ruling Case Law, Carriers, Sec. 462;
4 Elliott on Railroads, 3rd Ed., Sec. 2334 and 2338;
Mitchie on Carriers, Section 2085;
3 Hutchinson on Carriers, Sec. 1608.

The case of Nelson v. G. N. Ry. Co., 28 Mont. 297, 72 Pac. 642, is contrary to the general rule and does not control in interstate shipments.

However, this matter is not subject to even slightly varying state decisions, as the shipment was an interstate shipment, for the following cases hold that the question of the burden of proof in interstate matters is a matter of substance and not of procedure and is not a subject of state decision but of general law to be decided by the Federal Courts and that the Federal rule is, in accordance with a whole host of authorities, to the effect that the burden of proof is on the shipper throughout where the caretaker accompanies the shipment:

Berry v. C. & A. Ry. Co., 203 S. W. 622 at 623;
Baker v. Schaff, 211 S. W. 103 to 104;
Bland v. C. & A. Ry. Co., 232 S. W. 268;
Neely v. Hines, 227 S. W. 650;
So. Pac. Ry. Co. v. Prescott, 240 U. S. 632, 60 L. Ed. 836; 36 Sup. Ct. 469.

Likewise as regards damages due to negligence of shipper, the burden of proof is on the shipper, to ow that the damage was caused by the carrier. Here greater part of the herd was in the exclusive pos-ssion of the shipper and was not again delivered to railroad at Great Falls until after five days. The esent case is an extreme case, for the same reason hich required the shipper to prove the condition of imals at the time he delivered them to a railroad, re-ired the shipper to prove the condition of the balance the herd when he, in effect, redelivered them to the ilroad at Great Falls. But in any case, where the ipper accompanies the stock under a contract to look ter them, part of the burden of proving that damage as caused by acts of the carrier requires that the bur-n of proof shall be on the shipper to show the dam-ge was so caused and not caused by the shipper's own ts. Hence, it was error to give Plaintiff's Requested struction No. 5 (Tr. fol. 558).

From

10 Corpus Juris, p. 382,

e quote:

"Burden of Showing Absence of Negligence of Caretaker. Where by agreement the shipper accompanies the stock for the purpose of taking care of it during transportation, the burden is on him in an action for loss or injury to show that such loss or injury was not due to any negligence on his part in the performance of the duties assumed by him, since he assumes duties as fully and explicitly as does the carrier."

We respectfully submit, therefore, that, as the evi-ence showed that the animals died or were damaged rom an inherent want of vitality however caused, the

instructions proposed by the plaintiffs (No. 3, 4, and 5; p. 244 to 246), were inapplicable to the case and were erroneous as placing the burden on the defendant, as was also the plaintiffs' proposed Instruction No. 3 (Tr. p. 244), given by the Court as the Court's Instruction No. 3 placing the burden further on the defendant to show whether the sickness was caused by acts of plaintiffs' caretaker during the transit.

MISCELLANEOUS.

Respondents have lately urged that petitioner should be denied relief because of delays. The delays are not petitioner's. Petitioner seasonably asserted its rights by filing a petition for removal. Respondents ought not to have resisted that petition, for, as regards a case founded on the Interstate Commerce Act, it has always been the law that this case was always removable, because if not removable except in Minnesota, defendant's home, it could not be removable at all because it did not arise under general laws of the United States, but jurisdiction existed under the 8th subdivision of Sec. 24 of the Judicial Code and, therefore, it could be removed only by a non-resident as "any other suit of a civil nature." (See 28 Judicial Code). The Lee case and the General Investment case certainly did not in any way change the law in this kind of case, founded on the 8th subdivision aforesaid.

As regards petitioner's duty to proceed in the Federal Court notwithstanding removal was refused, it was rather respondents' duty to allow removal and to move to remand if so advised. In the absence of an outstanding attachment or injunction petitioner would

not be impelled to proceed in the face of the State tribunal's decision and thus bring the State and Federal trial tribunals in conflict. Comity, proper practice, courtesy, and a whole host of decisions suggested just the course petitioner took; to bow to the State Court's ruling and seek relief through the State Appellate Court, in the meantime applying for and obtaining from the Federal trial Court an extension of the time to file the transcript on removal until thirty days after the State Court should sign the order of removal. As the State Court was ousted of jurisdiction, its proceedings were void and defendant need have done nothing more. But it is submitted that its action, thus approved by the order of the Federal trial tribunal, was in addition entirely proper. Any other course, though within its rights, would unnecessarily have brought State and Federal tribunals in conflict. Plaintiff had the key to the situation by seeking relief in the Federal tribunal. The delays have been plaintiffs' delays, a strange ground for urging a denial to defendant.

Besides the delays have been caused by respondents literally successfully urging upon the State Appellate Court to follow trial federal court decisions opposed to decisions of the Federal Supreme Court and to escape Supreme Court decisions by attempting distinctions without the slightest foundation—a course not to be encouraged. An examination of the briefs on the merits filed in this Court in said Cause No. 312, Oct. Term, 1923, will show how clearly this appears.

Delays in that this is the second application for certiorari are excused in that petitioner is thus not accused of proceeding tardily, but too soon, and it was the ex-

traordinary refusal of the Supreme Court of the State to follow the decisions of the Supreme Court of the United States that led to belief that it was proper to submit the petition (which was granted over respondents' objection) at that time; and here again respondents could have avoided the delay by not declaring that they might not consent to a reduction of the judgment and then, defeating certiorari, electing as they said they might not do; they could have elected at once, as they always intended, and this case would then long ago have been decided. It is respondents who have caused delays.

Moreover, delays can be avoided by respondents joining with petitioner as it now offers, in submitting this cause on the former record and briefs filed in said cause in its former appearance in this Court as Cause No. 312, October Term, 1923. In any event it would be new law that delays (even if not caused by respondents) can be a ground for defeating a question as fundamental as jurisdiction.

Besides this is urged by respondents only on the removal feature and does not affect the denial of other federal rights.

Lastly a failure to correct the decision in this case would confuse all of the Montana District Courts, on whom the Montana Supreme Court's decision would be binding.

Respectfully submitted,

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and
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